

**DECISION RECORD**

1. **DIVISION:** Migration & Refugee Division

**APPLICANT:** Miss Thi Minh Trang Hoang

**CASE NUMBER:** 1407572

**DIBP REFERENCE(S):** CLF2011/105431

**MEMBER:** Helena Claringbold

**DATE:** 2 July 2015

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.211(2) of Schedule 2 to the Regulations; and
- cl.801.221 of Schedule 2 to the Regulations.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 April 2014 to refuse to grant Miss Thi Minh Trang Hoang, the applicant, a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. Miss Hoang, born on 26 April 1992, is a national of Vietnam. She applied for the visa on 4 July 2011 on the basis of her relationship with Mr Duc Manh Nguyen, her sponsor. Mr Nguyen was born on 1 May 1992 in Vietnam. He is an Australian permanent resident (refer: D1 f1).
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied that Miss Hoang and Mr Nguyen were in a genuine spouse relationship.
5. Miss Hoang requested review of the delegate's decision. She appeared before the Tribunal on 24 June 2015 to give evidence and present arguments and provided the Tribunal with a copy of the delegate's decision record. The Tribunal also took oral evidence from Mr Nguyen. The applicant was represented in relation to the review by Miss MyYen Tran, her registered migration agent.

### CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether Miss Hoang is the spouse of Mr Nguyen as defined in s.5F of the Act.
7. The Tribunal has taken into consideration all the evidence in the Department's file CLF2011/105431, folio numbered 1-180, and the Tribunal file 1407572, folio numbered 1-73 and the parties' oral evidence at the Tribunal hearing.

#### **8. What is the background of this case based on all the evidence before the Tribunal?**

9. Miss Hoang is 23 years old. Her father, Van Son, mother, Thi My Van, sisters, Hoang Minh Tien and Minh Thang, reside in Vietnam. She has a sister, Thi Minh Tho, who resides in Australia. On 15 July 2010, she arrived in Australia on a Student visa.
10. Mr Nguyen is 23 years old. His father, Duc Hung, resides in Vietnam. His mother, Thi Bach Hong and brothers, Duc Dung and Quang Anh, reside in Australia. He arrived in Australia in July 2010.
11. In December 2010, Miss Hoang and Mr Nguyen met at a friend's party. They began dating and on 26 April 2011 Miss Hoang proposed to Mr Nguyen. On 11 June 2011 they registered their marriage (refer: D1 f9). On 26 June 2011, they held their wedding reception at the Barluck Restaurant.
12. Since their marriage they have lived with Miss Hoang's sister. Miss Hoang has completed 3 years study in childcare at TAFE, Bankstown, gaining a Diploma in Childcare. She is currently studying for a B.A. in Childcare at the University Western Sydney, Bankstown. When she is not attending classes or studying she works as a casual at a specialty tea shop. Mr Nguyen works in a bakery 6 days a week. The parties' salaries support Miss Hoang's education and their living expenses.

**13. Is the applicant the spouse or de-facto of an eligible citizen?**

14. The Tribunal is satisfied that Mr Nguyen, at the time of visa application and at the time of decision, is an Australian permanent resident (refer: D1 f1) and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

**WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP?**

15. At the time of application, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

**ARE THE PARTIES VALIDLY MARRIED?**

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Miss Hoang provided evidence of her marriage to Mr Nguyen (refer D1 f9). On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
19. In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
20. The Tribunal has had regard to the parties' financial relationship; the nature of their household; the social aspects of the relationship; and the nature of their commitment to each other. On these aspects the Tribunal has considered all the evidence before it and is satisfied the facts of this case are as follows: the parties have a joint bank account. The account is managed by the applicant. She collects their salaries and deposits these into the account. The account is then used to manage payment for her studies. These are substantial being \$11,000 in this current year and approximately \$14,000 for each of the 3 years prior. Other living expenses are also managed via this account. When the parties run

short of money they are supported financially by the applicant's sister. The parties purchased a second hand car in 2014, which is in the sponsor's name. Since their marriage they have lived with Miss Hoang's sister and her husband and it is in this environment they live as husband and wife. Their families recognise the parties as being in a spousal relationship. They celebrate birthdays and family occasions together. They share their household chores; however, the visa applicant does the cooking. They support and encourage each other and are committed to each other. They have been married since 2011 and have been living in a spouse relationship since that time. The applicant is keen to obtain full time employment to ease the parties' financial difficulties. She will continue to study to gain qualifications. They want to become financially secure before having children and are committed to purchasing a home.

21. In view of all the above, the Tribunal is satisfied that there is broad-based public recognition of the parties' relationship. The Tribunal is satisfied by the parties' oral evidence at hearing that they demonstrate a sound knowledge of each other's lives which is commensurate with a couple in a genuine and ongoing spousal relationship. In respect of whether there is a mutual commitment to a shared life as spousal partners to the exclusion of all others, the Tribunal accepts the parties' oral evidence as presented at hearing.

• **FINDINGS**

22. The Tribunal is satisfied that at the time of application and at the time of decision the sponsor and the applicant had a mutual commitment to a shared life as spousal partners to the exclusion of all others; that their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis. The applicant therefore meets the requirements of s.5F of the Act.
23. The Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of others; that they have a genuine and continuing relationship; and that they live together and not separately and apart on a permanent basis.
24. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
25. Therefore the applicant meets cl.801.211 and cl.801.221.

**DECISION**

26. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
27. The Tribunal remits the application for a Partner (Residence) (Class BS) visa, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.211(2) of Schedule 2 to the Regulations; and
  - cl.801.221 of Schedule 2 to the Regulations.

Helena Claringbold  
Member

2 July 2015

**28. ATTACHMENT - Extract from Migration Regulations 1994**

### 1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).